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IN THE

Supreme Court of the United States

OCTOBER TERM, 1942

No. 761

UNITED STATES OF AMERICA, Ex Rel. MURRAY BRENSILBER, and EMANUEL THEBNER, and MURRAY BRENSILBER and EMANUEL THEBNER, on their own behalf,

Petitioners,

v.

BAUSCH & LOMB OPTICAL COMPANY, CARL ZEISS, INC., M. H. EISENHART, CARL L. BAUSCH and THEODORE B. DRESCHER.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF IN OPPOSITION SUBMITTED ON BEHALF OF CARL ZEISS, INC.

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United States of America, Ex Rel. Murray Brensilber, and Emanuel Thebner, and Murray Brensilber and Emauel Thebner, on Their Own Behalf,

Petitioners,

v.

Bausch & Lomb Optical Company, Carl Zeiss, Inc., M. H. Eisenhart, Carl L. Bausch and Theodore B. Drescher.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI SUBMITTED ON BEHALF OF CARL ZEISS, INC.

Opinions Below

There was no opinion by the District Court.

The unanimous opinion of the Circuit Court of Appeals for the Second Circuit per curiam affirming the orders of the District Court dismissing the proceeding was handed down on November 5, 1942, and is reported in 131 F. 2d, 545.

Jurisdiction

The judgment of the Circuit Court of Appeals for the Second Circuit was entered on November 23, 1942. Petitioner invokes the jurisdiction of this Court under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925.

Questions Presented

(1) Whether a violation of the Anti-Trust laws, allegedly antecedent to the execution of a contract with the Government, is a claim false, fictitious and fraudulent within the meaning of the Informer Act, Sections 3490-3494, 5438 of the United States Revised Statutes (USC Title 31, Secs. 231-235).

(2) Whether the Informer Act, R. S., Sections 3490-3494, 5438 (USC Title 31, Secs. 231-235) imposes liability on an alleged party to a conspiracy to violate the Anti-Trust Act, who never at any time, pursuant to the conspiracy or otherwise, had any dealings with the Government or any officer thereof.

(3) Whether an action can be maintained under the Informer Act, R. S. 3490-3494, 5438 (USC Title 31, Secs. 231-234) against a corporation for damages for not dealing in material which the Government might wish to purchase.

Statutes Involved

The action is brought under Revised Statutes, Sections 3490-3494, inclusive, (Complaint, Paragraph Seventeenth, R. 9, Amended Complaint, Paragraph Eighteenth, R. 84).

Sections 3490-3493, inclusive (31 USC, Sections 231-234) are given in the appendix infra.

Sec. 3490 of the Revised Statutes above referred to refers to Sec. 5438 of the Revised Statutes of February 18, 1878.

Sec. 5438 of the Revised Statutes of February 18, 1878 superseded ch. 67 of March 2, 1863 (12 Stat. p. 696).

By ch. 235 of the Laws of 1908 (35 Stat., p. 555) Sec. 5438 of the Revised Statutes was amended, a copy is given in the appendix infra.

Statement

This action, which was brought in December of 1941, followed the disposal of an indictment brought in the United States District Court for the Southern District of New York by the Department of Justice against Bausch & Lomb Optical Company, Carl Zeiss, Inc., M. H. Eisenhart, Carl L. Bausch, Theodore B. Drescher and Carl Zeiss of Jena, Germany, (R. 87-109*) for a violation of the Anti-Trust laws on the ground that Bausch & Lomb Optical Company and Carl Zeiss of Jena entered into an agreement on April 28, 1921, Ex. A & B, R. 145-150, and supplemental agreements dated June 27, 1925, October 28, 1925, and November 26, 1926; Exhibits C, D & F, R. 151, 153 and 157, respectively whereby Bausch & Lomb Optical Company obligated itself not to sell optical instruments outside the United States of America and Carl Zeiss of Jena obligated itself not to sell military optical instruments to the United States (R. 95).

Carl Zeiss, Inc., which was incorporated under the laws of New York in 1925 (R. 42), never at any time dealt

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* All references are to pages in the Transcript of record.

in or was concerned with military optical instruments (R. 43). Its exclusive business was selling cameras, telescopes, microscopes and optical instruments for civilian purposes (R. 43). It was made a defendant to the indictment on the ground that it was a subsidiary of Carl Zeiss of Jena and had refused to sell military optical instruments in the United States (Indictment R. 99, Bill of Particulars R. 204).

On March 5, 1941, the District Court accepted the plea of nolo contendere and imposed a fine of $1,000. on Carl Zeiss, Inc., which was paid (R. 42). All the defendants named in the indictment are made parties to this action except Carl Zeiss, of Jena (R. 87, 89).

The original complaint which was served (R. 60) on December 31, 1941, (R. 3-10), after alleging a violation of the Sherman Anti-Trust Act (USC Title 15, Sec. 1) and the sale of military optical instruments to the United States Government by all the defendants (R. 6, 7) alleged that such acts violated the Informer Act (R. 9) and asked for double damages against all the defendants in the sum of forty million dollars (R. 10).

Bausch & Lomb Optical Company, M. H. Eisenhart, Carl L. Bausch and Theodore B. Drescher by their attorneys by order to show cause dated January 6, 1942, returnable January 16, 1942, asked for an order dismissing the complaint on the ground:

(a) Of improper venue.

(b) That the complaint did not state a cause of action and directing summary judgment on the ground that the complaint and affidavits showed that there was no general issue therein (R. 11, 12).

At the same time a motion was made on behalf of Carl Zeiss, Inc., for a judgment dismissing the complaint under Rule 12(a) of the Rules of Civil Procedure because the complaint failed to state a cause of action and for a summary judgment under Rule 56 on the ground that the complaint and affidavits showed there was no general issue as to any material fact (R. 39).

Not only did the original complaint fail to state a cause of action under the Informer Statute against any of the defendants but the indictment and the bills of particulars filed in the Clerk's office in the District Court of the Southern District of New York showed that petitioners deliberately charged in their complaint matters contrary to the facts shown in the indictment and bills of particulars. The following allegations relating to Carl Zeiss, Inc., were false:

(a) That the officers of Bausch & Lomb Optical Company were officers of Carl Zeiss, Inc., (original complaint, para. "FIFTH", R. 4);

(b) That Carl Zeiss, Inc., manufactured and sold "military optical instruments" (complaint, para. "SIXTH", R. 4);

(c) That Carl Zeiss, Inc., was a party to the conspiracy between Carl Zeiss of Jena and Bausch & Lomb Optical Company (complaint, para. "EIGHTH", R. 5).

(d) That Carl Zeiss, Inc., sold military optical instruments to the United States Government (complaint, para. "TENTH" and "ELEVENTH", R. 6, 7).

(e) That Carl Zeiss, Inc., presented bills for military optical instruments to the United States Government (complaint, para. "TWELFTH", R. 8).

(f) That Carl Zeiss, Inc., was paid by the United States Government for the military optical instruments sold by Carl Zeiss, Inc., to it (complaint, para. "FOURTEENTH", R. 8, 9).

The motion of Carl Zeiss, Inc. to dismiss, dated January 6, 1942, was supported by the affidavit of Karl A. Bauer (R. 41, 45), pointing out the defects. The motion was made returnable January 16, 1942. On January 13, 1942, (R. 61) petitioners served what purports to be an amended complaint (R. 78-85). Immediately an order to show cause, returnable January 16, 1942, was procured by Carl Zeiss, Inc. asking for an order striking out the amended complaint as sham and false; denying leave to plaintiffs to serve it and in the alternative dismissing it under Rule 12 as not stating a cause of action and for summary judgment under Rule 56 on the ground that it raised no genuine issue (R. 57-59). In this Carl Zeiss, Inc., followed the procedure of the other defendants (R. 46-56). To all motions petitioners submitted two affidavits in opposition (R. 64-77).

The amended complaint so far as it related to Carl Zeiss, Inc., left out the allegations in the original complaint which the indictment and Mr. Bauer's affidavit showed were false. There was left in the complaint:

(a) That Carl Zeiss, Inc., was a New York corporation doing business in New York (para. "FOURTH", R. 78, 79).

(b) That it is dominated, controlled and operated by Carl Zeiss of Jena (para. "SIXTH", R. 79).

(c) That Carl Zeiss of Jena carried on business in New York through Carl Zeiss, Inc. (para. "SEVENTH", R. 79).

(d) A general allegation that Carl Zeiss, Inc., was after its incorporation engaged in the conspiracy with Carl Zeiss of Jena and Bausch & Lomb Optical Company to fix territorial limits and control prices (para. "ELEVENTH", R. 80, 81).

(e) That it refused to sell military optical instruments in the United States (para. "TWELFTH", R. 81).

(f) That it "aided and abetted" and participated in the alleged matters (para. "SIXTEENTH", R. 83).

It left out of paragraphs "THIRTEENTH" and "FOURTEENTH" all charges against Carl Zeiss, Inc., as to the sale and delivery of military optical instruments and all charges as to bids and contracts with the Government of the United States (R. 81, 83). It expressly excepted Carl Zeiss, Inc., from the charge in paragraphs "FIFTEENTH" and "SEVENTEENTH" which alleged the presentment of bills to the United States Government and the receipt of money from the Government (R. 83, 84). Accordingly, there is nothing in the amended complaint sustaining the charge in paragraph "SIXTEENTH" thereof (R. 9). That the "aforesaid agreements, acts and conducts" by the defendant Carl Zeiss, Inc., violated Sec. 3490-3494 (U. S. C. 231-235).

The order of the District Court decrees this amended complaint to be a nullity and denies petitioners application to serve the proposed amended complaint (R. 254-258).

The order also dismisses the original complaint, granting summary judgment to the defendants as asked for (R. 261).

The statement in the opinion of the Circuit Court of Appeals on this case, 131 F. 2d 545, at p. 547; i. e.:—

> "The action is of precisely the sort which a motion for summary judgment was intended to nip in the bud."

seems particularly applicable when such pleadings are offered.

To the equitable action for a declaratory judgment and injunction against Bausch & Lomb Optical Company, M. Herbert Eisenhart, Carl L. Bausch and Theodore B. Drescher (R. 243), which the Department of Justice customarily brings after disposing of the indictment in the anti-trust suit, Carl Zeiss, Inc., was not made a party.

In that part of petitioners' brief to this Court entitled "Reasons for Granting the Writ" (Petition, p. 13 et seq.) no reasons are given or suggested as to why the writ should be allowed as to Carl Zeiss, Inc.

Carl Zeiss, Inc., should not be confused with Carl Zeiss of Jena, which made the agreements with the Bausch & Lomb Optical Company and is not a party to this action.

ARGUMENT

Petitioners Have Shown No Reason Why A Writ of Certiorari Should Be Granted

I. The case was decided by the Courts below in accordance with the established law.

In *United States ex rel. Kessler* v. *Mercur Corporation, et al.*, 13 F. Supp. 742 (S. D. N. Y.—1935) affd. 83 F. (2d) 178; cert. den. 299 U. S. 576, Judge Patterson says as to the statute involved in this case:—

> "* * * An informer's action will therefore lie only in cases where the defendant has made false, fictitious or fraudulent 'claim upon or against' the Government of the United States. This means a claim for money or property 'to which a right is asserted against the Government, based upon the Government's own liability to the claimant.' "

This he took from *United States* v. *Cohen*, (1926) 270 U. S. 339, pp. 345-346, where an indictment brought under Sec. 35 of the Penal Code was dismissed. In ch. 351 of the Laws of 1909, Sec. 5438, of the Revised Statutes, was repeated verbatim as Sec. 35 of the Penal Law so that the case is directly in point. The opinion points out clearly that Sec. 35 of the Penal Law relates only to the payment or approval of a claim against the Government based upon the Government's own liability for the claim. Further, at p. 346, it particularly holds that under Sec. 35 of the Penal Law the crime is restricted to defrauding the Government in dealing with the Government and that Sec. 37 of the Penal Law (which has nothing to do whatever with the Informer Statutes) makes it a crime to conspire against the Government.

In *United States ex rel. Marcus* v. *Hess*, 41 F. Supp. 197; Rev. 127 F. (2d) 233; Rev. U. S. Supreme Court (87 L. Ed. 374) where in an informer action the verdict of the District Court was sustained by this Court. The distinction is drawn between the facts in such cases as *United States* v. *Cohen (supra)*, 270 U. S. 339, and the facts before the Court in that case. See p. 378 and also p. 377, where Mr. Justice Black points out that Government money was placed in a joint fund for payment to the respondents who were before the Court and that these same respondents had been convicted under 18 U. S. C. 88 for the crime of fraudulently conspiring against the Government. The opinion of the solicitor general in that case, referred to in the petition, p. 23, has no application here where there is no conspiracy under Sec. 88 of the Penal Law and no criminal fraud as known to the law.

Likewise, in *United States* v. *New Orleans Chapter, etc.*, 127 F. (2d) 649, reversed United States Supreme Court, 87 L. Ed. 386, where the respondents also actually received proceeds of their conduct and had also been convicted under 18 U. S. C. 88.

The case at bar against Carl Zeiss, Inc., is devoid of any such charge of fraud or criminal conspiracy and comes clearly under the opinion in *United States* v. *Cohen (supra)*, 270 U. S. 339, and the holding in similar cases which decide that before there can be a cause of action there must be a false, fictitious or fraudulent claim based upon the Government's liability as in

> *United States ex rel. Kessler* v. *Mercur Corporation (supra)*, 13 F. Supp. 742, affd. 83 F. (2d) 178, cert. den. 299 U. S. 576;

Mandel v. *Cooper Corporation* (S. D. N. Y. 1941), 42 F. Supp. 317;

United States v. *Miskell* (1883), 15 Fed. 369.

The opinion of the Circuit Court of Appeals in the case at bar follows the same principal that there must be a false, fictitious or fraudulent claim against the Government and against funds due from the Government and that the cause of action cannot be founded on a monopoly alone.

II. That the Courts have consistently refused to entertain actions where the fraud was not such as defined in the Statutes:—

Olson v. *Mellon*, 4 F. Supp. 947 (W. D. Pa., 1933), affd. 71 F. (2d) 1021 (C. C. A. 3rd, 1934), cert. den. 293 U. S. 615 (1934);

United States v. *McMurtry*, 5 F. Supp. 515 (Ky., 1933).

III. An action under this statute cannot be maintained against a corporation.

Carl Zeiss is a domestic corporation incorporated under the laws of the State of New York (amended complaint, para. Fourth, R. 78).

Sec. 3490 of the Revised Statutes states that an action may be brought against "any person not in the military or naval forces of the United States, etc., etc." That the word "person" used in this section does not include a corporation and that the action can only be brought against an individual, see:

United States v. *Kansas Pac. Ry. Co. et al.* (1877), Fed. case #15506 (26 Fed. cases, p. 680).

Conclusion

This case does not raise questions of any special gravity or general importance. We have shown that the decision of the Circuit Court of Appeals, which petitioners desire to have reviewed, is in complete accord with the decisions of this and other federal courts. There has been no misinterpretation of the statute.

Petitioners have shown no reason for the granting of a writ of certiorari so far as Carl Zeiss, Inc., is concerned, and the petition should be denied.

Respectfully submitted,

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Appendix

Sections 3490-3493 of the Revised Statutes (31 U. S. C. 231-234) read as follows:

"Sec. 3490. Any person not in the military or naval forces of the United States, or in the militia called into or actually employed in the service of the United States, who shall do or commit any of the acts prohibited by any of the provisions of section fifty-four hundred and thirty-eight, Title 'CRIMES,' shall forfeit and pay to the United States the sum of two thousand dollars, and, in addition, double the amount of damages which the United States may have sustained by reason of the doing or committing such act, together with the costs of suit; and such forfeiture and damages shall be sued for in the same suit.

"Sec. 3491. The several district courts of the United States, the Supreme Court of the District of Columbia, the several district courts of the Territories of the United States, within whose jurisdictional limits the person doing or committing such act shall be found, shall, wheresoever such act may have been done or committed, have full power and jurisdiction to hear, try, and determine such suit. Such suit may be brought and carried on by any person, as well for himself as for the United States; the same shall be at the sole cost and charge of such person, and shall be in the name of the United States, but shall not be withdrawn or discontinued without the consent, in writing, of the judge of the court and the district attorney, first filed in the case, setting forth their reasons for such consent.

"Sec. 3492. It shall be the duty of the several district attorneys of the United States for the respective districts,

for the District of Columbia, and for the several Territories, to be diligent in inquiring into any violation of the provisions of section thirty-four hundred and ninety by persons liable to such suit, and found within their respective districts or Territories, and to cause them to be proceeded against in due form of law for the recovery of such forfeiture and damages. And such person may be arrested and held to bail in such sum as the district judge may order, not exceeding the sum of two thousand dollars, and twice the amount of the damages sworn to in the affidavit of the person bringing the suit.

"Sec. 3493. The person bringing said suit and prosecuting it to final judgment shall be entitled to receive one-half the amount of such forfeiture, as well as one-half the amount of the damages he shall recover and collect; and the other half thereof shall belong to and be paid over to the United States; and such person shall be entitled to receive to his own use all costs the court may award against the defendant, to be allowed and taxed according to any provision of law or rule of court in force, or that shall be in force in suits between private parties in said court: *Provided*, That such person shall be liable for all costs incurred by himself in the case, and shall have no claim therefor on the United States."

Ch. 235 of the Laws of 1908, 35 Stat. p. 555 (embodied in 31 U. S. C. 231), reads as follows:

"Chap. 235.—An Act to amend section fifty-four hundred and thirty-eight of the Revised Statutes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress as-

sembled, That section fifty-four hundred and thirty-eight of the Revised Statutes be, and the same is hereby, amended to read as follows:

"Sec. 5438. Every person who makes or causes to be made, or presents or causes to be presented, for payment or approval, to or by any person or officer in the civil, military, or naval service of the United States, any claim upon or against the Government of the United States, or any department or officer thereof, knowing such claim to be false, fictitious, or fraudulent, or who, for the purpose of obtaining or aiding to obtain the payment or approval of such claim, makes, uses, or causes to be made or used, any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry, or who enters into any agreement, combination, or conspiracy to defraud the Government of the United States, or any department or officer thereof, by obtaining or aiding to obtain the payment or allowance of any false or fraudulent claim, or who, having charge, possession, custody, or control of any money or other public property used or to be used in the military or naval service, who with intent to defraud the United States or willfully to conceal such money or other property, delivers or causes to be delivered, to any person having authority to receive the same, any amount of such money or other property less than that for which he received a certificate or took a receipt, and every person authorized to make or deliver any certificate, voucher, receipt, or other paper certifying the receipt of arms, ammunition, provisions, clothing, or other property so used or to be used, who makes or delivers the same to any other person without a full knowledge of the truth of the facts stated therein, and

with intent to defraud the United States, shall be imprisoned at hard labor for not more than five years, or fined not more than five thousand dollars; and every person who knowingly purchases or receives in pledge for any obligation or indebtedness from any soldier, officer, sailor, or other person called into or employed in the military or naval service any arms, equipments, ammunition, clothes, military stores, or other public property, whether furnished to the soldier under a clothing allowance or otherwise, such soldier, sailor, officer, or other person not having the lawful right to pledge or sell the same, shall be punished by imprisonment for not more than two years and by a fine not exceeding five hundred dollars."

Approved, May 30, 1908.